No. 282

In the Supreme Court of the United States

OCTOBER TERM, 1951

SWIFT AND COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION OF THE INTERSTATE COMMERCE COMMISSION TO AFFIRM

In the District Court of the United States for the Northern District of Illinois, Eastern Division

Civil Action No. 50–C–1017

SWIFT AND COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES

MOTION TO AFFIRM

Appellee, Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the District Court be affirmed.

This is a direct appeal from the final order and decree entered on June 21, 1951, by a district court of three judges specially constituted pursuant to Sections 2284 and 2325, Title 28 of the United States Code, dismissing appellant's complaint which sought to set aside an order made by the Interstate Commerce Commission on July 6, 1949. Appeal was allowed on July 26, 1951, and appeal papers were served on July 30, 1951.

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Appellant (hereinafter referred to as Swift), by complaint filed before the Commission, alleged in substance that the rates, charges and practices in connection with direct shipments[1] of livestock in carloads from points outside Illinois for delivery to its plant in Chicago are unreasonable; and unduly prejudicial to livestock as a commodity, and also to appellant, and preferential of its competitors in Illinois and in several western states; in violation of Sections 1 and 3 of the Interstate Commerce Act.[2] Swift asked the Commission to

[1] Shipments consigned directly to packers and not offered for sale in the public market.

[2] Section 1 (4) provides: "It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; * * *."

Section 1 (5) makes unlawful every unjust and unreasonable charge.

Section 3 (1) provides: "It shall be unlafful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

prescribe reasonable rates and charges, including joint through rates between line-haul railroads, serving Chicago, and Chicago Junction Railway [3] (hereinafter called Junction). Such would require railroads to deliver carload shipments of livestock upon Swift's proposed private side track (served by Junction through its Ashland Avenue yards and located in close proximity to the Union Stock Yards) at rates and charges that would not exceed those for delivery at the unloading pens of the Union Stock Yards which were assessed on the bases of the line-haul rate without the payment of any charge for switching.[4]

The principal issue in proceedings before the Commission, as well as in the District Court, was therefore, whether Swift was entitled to have direct shipments of livestock delivered by the Junction, on a private siding at a plant which Swift proposed to build, without any charge in addition to the line-haul rates.

Swift's proposed plant is to be located on the tracks of the Junction which has, and for many years has had, on file with the Commission a tariff providing for a switching charge for the delivery of a carload of livestock to private plants in the area of the Union Stock Yards (herein-

[3] This is the railroad receiving cars from line-haul carriers at Chicago for delivery to consignees in the switching district.

[4] The Union Stock Yards is a public livestock terminal at Chicago which receives shipments of livestock for any and all consignees, including Swift, if it so desires.

after called Stockyards). The line-haul carriers perform no switching service in the stockyards area and have never delivered any livestock at any place in the area other than at the Stockyards.[5] They have running rights thereto over the tracks of the Junction, the only railroad serving the yards. The Junction has never, except in an emergency, handled livestock in switching service, but its tariff covering switching of livestock provides a rate in the event the service is furnished.[6]

In deciding that the appellant is not entitled to private plant delivery without the payment of the switching charge published by Junction and that the published charge was and is not unreasonable the Commission made the following finding (pp. 575–6 of its report), which is clearly supported by substantial evidence as hereinafter shown:

> The evidence affords no basis for a conclusion that the terminal charge of the Junction in addition to the line-haul rates is unreasonable for deliveries of livestock to the proposed plant, considering services and modification of services that would be required for the desired deliveries and the effect upon terminal operations generally

[5] Except Swift's shipments received via Burlington at the Omaha plant.

[6] The Commission also denied the petition of Junction to be allowed to discontinue the availability of this service by the cancellation of pertinent tariffs.

> of performing such delivery services to the proposed plant.

This subsidiary finding is followed by the ultimate finding:

> We find (1) that in the circumstances presented the published switching charges in addition to the line-haul rates will not be unreasonable or otherwise unlawful for the transportation of livestock for delivery on the private sidetracks to be constructed by complainant, * * *.[7]

As indicated above, Junction does not handle livestock, except in an emergency, and all such stock destined to packing houses within the stockyard area, is delivered to the Stockyards by the

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[7] These and the other findings of the Commission are based upon evidence adduced at the Commission hearing which shows that Swift's proposed plant will be located in the small compact area of Chicago, known as "Packingtown" (Tr. 39), which includes the plants of 13 or more other packers (Tr. 122). It is probably one of the most congested industrial areas in the world. The flow of the raw materials and supplies necessary to the operation of the industries in the stockyard area, and the outbound movements therefrom, depend on the ability of the railroads to furnish efficient service (Tr. 333–35; 693). The Junction Railway, the switching line providing the sole connection between some 22 line-haul carriers and approximately 500 industries located in the stockyards area and vicinity, is the funnel through which a tremendous volume of tonnage must be moved, consisting of hundreds of thousands of cars of dead freight, perishables, and empties. These include cars of dead freight consigned to packing houses and the empties and carloads of packing house products shipped from the packers' plants within the areas (Tr. 297).

line-haul carriers. After unloading, the stock is delivered to the packers in the area by means of an extensive system of overhead viaducts, runways and tunnels owned, operated and maintained by the Stockyards. The evidence is uncontradicted that Junction's Ashland Avenue Yard, the only yard available for receipt and interchange of all freight consigned for private plant delivery, is scarcely able to accommodate any increase of cars over those already being handled and that there is no space available for expansion of the yard.[8]

[8] The line-haul railroads are able to serve only the Stockyards and have no access to any other industry in the area (Tr. 297–98; 443); while all livestock is delivered exclusively by the line-haul carriers, all other freight moving to or from the stockyards area is handled by Junction, being interchanged by it with the trunk lines.

All freight destined to industries on the Junction must be interchanged between the line-haul carriers and Junction at the Ashland Avenue Yard (Tr. 297–8). Also all livestock going to the stockyards must pass through this yard. This is accomplished by the means of three main running tracks (Tr. 365) over which trains may pass through and move to and from the Ashland Avenue Yard. One of these tracks provides the sole means of ingress for the line-haul carriers to reach the Stockyards, and is available and used only for all eastbound traffic (Tr. 590). These three main running tracks form the line dividing the Ashland Avenue yard into two parts known as the North Yard and the South Yard, each serving a particular function. The 24 tracks of the North Yard are used exclusively for traffic outbound from industries on the Junction. The South Yard, consisting of 33 tracks, receives, classifies and handles all freight destined to industries on the tracks of Junction. Of these only 9 are available as receiving tracks and all freight destined to

The average annual movement of livestock to the Stockyards is approximately 77,000 cars.[9] This means a total of 154,000 livestock cars, loaded and empty, are handled over Junction's tracks by the line-haul carriers.[10] None of that number is attributable to Swift; it receives all of its directs, averaging about 6,500 cars annually, at the facilities of its subsidiary, the Omaha Packing Co., located on the Burlington Railroad, about 2½ miles from the stockyards and outside the stockyards area, from whence the stock is transported to its plant in the stockyards area by truck.[11] Swift is the only large packer having a plant located on the rails of a line-haul carrier in Chicago.

Many trains carrying livestock to Chicago also carry some dead freight and perishables. At the line-haul carriers' base yards the livestock and dead freight are separated and livestock is consolidated, by awaiting the arrival of other trains for additional cars, so as to avoid making more than one run to the stockyards if one would

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industries on the Junction must funnel through these nine tracks (Tr. 320–21; 327; 443). Both the North and South Yards are used to capacity (Tr. 455). The Ashland Avenue Yard serves the busiest and most crowded rail operation in the Chicago area (Tr. 693; 33–35). It is hemmed in on all sides and there is no room for expansion (Tr. 301; 478–9).

[9] Of this number approximately 31,000 were direct shipments.

[10] (Tr. 18–20).

[11] (Tr. 557–62).

suffice.[12] This method of handling is usually employed unless it is necessary to make a rush delivery of a car or some cars in order to avoid violating the 28-hour law.[13]

This present method of delivery of livestock and handling of dead freight has been developed through many years of experience with the result that a high degree of efficiency has been attained through coordination and synchronization of movements of the various types of freight, and any change in delivery practice, such as is proposed by Swift would prove injurious of that efficiency and result in congestion and delay. The tremendous growth of industry in the stockyards area has resulted in rail operations being conducted to their full capacity with only a narrow margin between the present efficient operation and a condition which would render difficult the

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[12] (Tr. 459; 593; 652–53).

[13] 45 U. S. C. Sec. 71 prohibits confinement of cattle, etc., for more than 28 hours without unloading for resting, watering, and feeding.

About 63 percent of the trains going to the stockyards handle livestock exclusively and do not have to stop on the main running eastbound track to make setouts of dead or perishable freight at Ashland Avenue Yard. The other 37 percent stops to make such setouts (Tr. 363), and while so engaged other trains seeking entrance to the stockyards must await the completion of the setting out operations as the line-haul train, engaged in doing this leaves its livestock cars on the main running track of the Junction while the dead freight cars are set off (Tr. 366–69).

orderly flow of freight through the Ashland Avenue Yard.[14]

In the event Swift or any other packer is accorded private plant delivery of its livestock at the line-haul rate, without the addition of a switching charge, the line-haul carriers would be required to absorb the switching charge of Junction. This charge, now said to be prohibitive and assessed as a penalty, is the identical charge, subjected to certain general increases, which the Commission held to be reasonable in *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553 (1933). The holding as to the reasonableness of the rate was not questioned or disturbed by the Supreme Court on appeal in

[14] If Swift's 6,500 cars or 13,000 cars per annum (loaded and empty, averaging 18 cars per day loaded or 36 loaded and empty) are to be added to the volume of traffic and interchanged with Junction and worked through the Ashland Yard (and they would have to be interchanged and worked), there would be required a quantum of service in making private side track delivery of livestock, which would entail additional and a different type of switching as well as modification of existing services to alleviate at least in part the resulting congestion and delays to all deliveries (Tr. 445, 455, 478–79, 590, 614–17). Working these cars would involve their careful placement, for such livestock cars cannot be handled ("kicked" or shoved to rest) like dead freight (Tr. 452). Later, these cars would have to be "dug out" of the yard from between cars of dead and perishable freight (Tr. 626–27) so delivery may be made to Swift's private plant.

Atchison, T. & S. F. Ry. Co. v. *United States*, 295 U. S. 193 (1935).[15]

It is submitted that it would be unlawful for the packers or any one else to be accorded a service for which they do not pay, and the record reveals (Exhibits 50–52) that the carriers receive no revenue on the basis of the line-haul rates that would allow them to pay the switching charge.[16]

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[15] The court reversed the Commission's order respecting the imposition of yardage charges for lack of proper finding of fact.

[16] In speaking of the switching charge the Commission stated (p. 574 of its report) that:

"The line-haul rates on livestock to Chicago apply only to deliveries served by the line-haul carriers. The Junction participates in certain joint rates on perishable and other dead freight out of which it receives for switching, a division of 3.15 cents per 100 pounds, minimum 60,000 pounds, which generally differs from and is lower than its local switching charge. In those instances in which the Junction does not participate in joint rates on dead freight, it collects its local switching charge. It does not appear that there are any joint rates on livestock from points in western trunk-line or southwestern territories in which the Junction is shown as a participating carrier.*

"The line-haul rates on livestock to Chicago are Commission-prescribed rates. In *Chicago Livestock Exch.* v. *Atchison, T. & S. F. Ry. Co.*, 219 I. C. C. 531, 545, 546, we said that 'the line-haul carriers operate over the tracks of the Chicago Junction to the Union Stock Yards and make delivery there thereby making these yards their own terminals.' We pointed out that in prescribing the rates on livestock to Chicago, among other markets, there was specifically taken into consideration as an element 'the rendition of terminal service in connection with the transportation of live stock,' and there was included what was considered 'sufficient to cover such terminal services under

The Supreme Court has held in numerous cases that the lawfulness of a rate is a matter for the determination of the Commission, whose judgment thereon will not be disturbed if supported by substantial evidence. *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541; *Western Paper Makers' Chemical Company* v. *United States*, 271 U. S. 268; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282; *Swift & Co.* v. *United States*, 316 U. S. 216; *Ayrshire Corp.* v. *United States*, 335 U. S. 573. In view of the foregoing it is submitted that there is no substantial question involved with respect to the issue of the reasonableness of the switching charge here challenged, which is the fundamental issue of the case.

Swift contends that livestock as a commodity is subjected to undue prejudice and disadvantage because dead freight and perishables are interchanged by the line-haul carriers with Junction for delivery on the private tracks of the consignees at the line-haul rate without the payment of the switching charge, while such a

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a normal operation as well as to cover the unloading and loading of livestock at public stockyards,' but we did not there consider what the services would be in connection with deliveries of livestock by the Junction on private industrial tracks. That carrier did not then and does not now perform such services."

*The Commission found (p. 576) that the establishment of joint rates on livestock as requested by Swift was not necessary or desirable in the public interest.

charge is or will be made when livestock is switched. As hereinbefore pointed out, the evidence adduced at the Commission hearing is convincing that livestock cannot be handled as easily as dead freight. It cannot be "kicked" onto a side track as other freight because of injury to the stock and livestock is subject to the Federal 28-hour law and must receive special handling often in order to prevent a violation of that law.[17] It is obvious that the transportation characteristics of livestock are quite different from those of dead freight. In *Swift and Company* v. *United States, supra,* p. 227, the court recognized this fact where it stated:

> This transportation is of a special kind of property on the hoof, which calls for special handling in the interest of economy, safety, sanitation, and health.

It seems clear, therefore, that there is no basis for Swift's charge that livestock, as a commodity, is subjected to undue prejudice and disadvantage. In view of the foregoing it is insisted that this is not a substantial issue, as the law is well settled that it is the Commission's function to determine the reasonableness of a rate and its orders will not be set aside if they are within the Commission's powers and are supported by substantial evidence. *Interstate Commerce Commission* v. *Union Pac. R. Co.*, 222 U. S. 541.

[17] (Tr. 600–601).

Swift further contends that the switching charge, in addition to the line-haul rate, applied on livestock for private plant delivery, is unduly prejudicial to Swift and preferential of its competitors in midwestern states, including Illinois and Chicago, which is said to be in violation of Section 3 of the Act.

Swift now has and has had the right to have its direct shipments of livestock consigned to it at the public stockyards in Chicago without the payment of any transportation charge other than the line-haul charge. No railroad delivers livestock at any other place, except to Swift itself at its Omaha plant, and perhaps occasional deliveries of shipments to small shippers at team tracks where they perform their own unloading. The record shows Swift does receive all of its direct shipments at its Omaha plant, located on the Burlington Railroad, without payment of any transportation charge other than that made for the line-haul carriage to Chicago. In view of this situation it is difficult to see how Swift is discriminated against or that its competitors are preferred at Chicago. On the contrary it would appear that Swift has the preference in Chicago.[18]

[18] In respect of the delivery of livestock at the Omaha plant as well as at the Stockyards as compared with the delivery sought by Swift, the Commission found that:

"The transportation services, conditions, and circumstances connected with deliveries at the Omaha plant pens are substantially dissimilar from those connected with the delivery here sought. There, the unloading chutes are on the rails of

In regard to Swift's claim that the rates and charges assessed on the transportation of livestock to its private siding in Chicago are unduly prejudicial to Swift and preferential of its competitors in midwestern states, the evidence of record shows, with but a single exception,[19] that no packer at any place named in states alleged to be preferred receives any greater service than does Swift at its Omaha Packing Company plant at Chicago. Each of the packers, which receives livestock at its plant, is located, like Swift's Omaha plant, on the rails of a line-haul carrier. At least at 25 of the 37 points named as preferred, and tabulated on Swift's Exhibit No. 12, there is no public stockyard which can serve, as does the Union Stockyards in Chicago, as a proper and adequate terminal for livestock.[20]

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a line-haul carrier, outside the stockyard congested area, and the delivery made by that carrier is nothing more than a simple switch, at carrier's ordinary operating convenience and without interruption or interference from connecting line engines, as all of the switching is under the control of and performed by the Burlington. The transportation services, conditions, and circumstances connected with deliveries by the line-haul carriers at the unloading chutes of the Union Stock Yards, as hereinbefore described, also are substantially dissimilar from the private track delivery sought." Commission's report, p. 574.

[19] Sioux City, Iowa. Even there the operations are not comparable to those in Chicago. Swift's Exhibit No. 12.

[20] Even at Sioux City, the only place where a competitor of Swift's receives livestock at a plant located in the immediate area of the public stockyards, Cudahy receives only a few

Based upon the evidence the Commission found no Section 3 violation and said with reference to the cases relied upon by Swift to prove undue prejudice and preference (pages 574–75 of the report) that:

> As support for the delivery of livestock to private industrial tracks without charges in addition to line-haul rates, complainant refers to *Baltimore Butchers Abbattoir & Live Stock Co.* v. *Philadelphia B. & W. R. Co.*, 20 I. C. C. 124, by the Commission, *Swift & Co.* v. *Baltimore & O. R. Co.*, 266 I. C. C. 55, by the Commission, and *Neuhoff Packing Co.* v. *Louisville & N. R. Co.*, 268 I. C. C. 271, by division 3, in which the refusal to make such deliveries at Baltimore, Md., Cleveland, Ohio, and Nashville, Tenn., respectively, was found unlawful. Deliveries to private industrial tracks at those points did not require substantial modification of terminal operations and

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shipments of sheep at its plant, which is located on the rails of the Sioux City Terminal Railroad.

In referring to the points named as preferred, in violation of Section 3, Swift's principal witness, Tally, testified that he did not know the detailed facts as to the physical operations at any of the places alleged to be preferred (Tr. 152) and stated, "I can't recall any place where the situation is identical (with Chicago)." (Tr. 154.) As against this evidence Witness Heinemann, Executive Vice President of the National Independent Meat Packers Association, testified that at no point in any state named is there a situation which is comparable to the conditions which would be created at Chicago by the delivery of direct shipments at plants of the packers located in the stockyards area (Tr. 1066).

> interferences with established operations in a manner required at Chicago for such deliveries, and did not involve, as at Chicago, serious disruption of operations. There is no showing that services as desired will result in a situation similar to that at a point or points alleged to be preferred.

It is seen, therefore, that the published switching charge of Junction for delivery of direct shipments of livestock to the private plants of packers does not result in undue prejudice to Swift and preference to its competitors at any place said to be preferred. It is submitted that the finding of the Commission that there was no showing of undue preference and prejudice is supported by substantial evidence and is in accord with the legal standards which must be applied in determining the lawfulness of transportation rates and charges. (*Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481; *United States* v. *Wabash R. Co.*, 321 U. S. 403, 410–13.) Such issue presents no substantial question.

There is no merit to Swift's contention, as revealed in its jurisdictional statement, that the Commission erred in treating Junction as an independent carrier rather than as a part of the New York Central. It is difficult to see how Swift could be serious in contending that these are substantial issues. Junction's status in this regard does not and could not have any bearing on

the reasonableness and lawfulness of its switching charge.

Likewise, there is no merit with respect to the contention that Union Stock Yards has a pecuniary interest in Junction, protected by a covenant, which Swift apparently contends the rulings of the Commission and the District Court have enforced, resulting in Swift being deprived of a service to which it would otherwise be entitled.

Neither the Commission's order nor the decision of the Court was based in any respect on the questioned covenant, and while it was in effect refusing to recognize by failing to give any effect to the covenant, the Commission expressly held that the operation of the Junction was subject to the conditions imposed by the Commission itself and the Interstate Commerce Act. By the covenant referred to, contained in a lease, dated December 1, 1913, between Union, lessor, and Junction, lessee, Junction agreed "to conduct, manage, and operate the line of railroad by this instrument demised, and insofar as possible the same to conduct in such manner as will tend to the benefit, advantage, and behoof of the business and affairs of the yards." This same clause was incorporated in a later lease executed May 19, 1922, when Junction subleased its line to the Chicago River & Indiana R. Co. (a subsidiary of N. Y. C. R. R.) for 99 years with option to renew in perpetuity. In connection with this contention

the Commission found that the lease of Junction to the River Road completely divested the stockyards of operations and control of the terminal railroad.[21] This finding was approved and adopted by the court below. See *Neuhoff Packing Co.* v. *L. & N. R. Co.*, 268 I. C. C. 271; *Great Northern Ry. Co.* v. *Delmar Co.*, 283 U. S. 686, 691. Cf. *United States* v. *Baltimore & Ohio R. Co.*, 333 U. S. 169.

Swift asserts that another substantial question presented on this appeal is whether the Commission may lawfully deny service at the line-haul rate to a single shipper at its own side-track in respect of a single commodity, on the ground that

[21] The Commission's report states (p. 575):

"The effect of the leases was to completely divest the Union Stock Yards of operation and control of the terminal railroad, the Court saying that by ceasing to operate or control its railroad directly or indirectly, the Union Stock Yards restricted its transportation service to the loading or unloading of livestock as specified in its tariff. The operation of the Chicago Junction is subject not only to the provisions of the Interstate Commerce Act but also to the conditions imposed by the Commission in the *Chicago Junction Case*, *supra* [71 I. C. C. 631]. Those conditions were particularly intended to insure that the Chicago Junction and the Chicago River & Indiana should be operated as neutral terminal carriers, without special advantage favoring the New York Central but the conditions were and are broad enough to inhibit operation of the Chicago Junction to the special advantage and interest of the Union Stock Yards."

The Commission retained jurisdiction in the *Chicago Junction Case* for the purpose of making any additional requirements or conditions as may be necessary for the protection of the public.

the furnishing of the service would interfere with and disrupt terminal operations while still permitting the identical service at a high additional charge (Junction's switching charge). This insistence assumes that the Commission should proceed to deal with practical problems blindfolded. Swift's main contention and prayer was that line-haul rates include the switching service. That meant that all of Swift's shipments of livestock would have to be delivered through the already crowded and congested terminal facilities of Junction. In fixing the rate for switching of livestock, it is now and always has been necessary to have such a rate as emergency shipments were always possible. The great difference the service involves between livestock and dead freight, not only because of the very nature of the delivery but because the yards had been adapted to dead freight delivery, would make the higher rate reasonable for livestock.

The Commission will not, and should not be required to resort to legalistic thinking as a substitute for the application of reason to practical problems. While the charge was entirely reasonable for the service the Commission knew that it would be availed of when Swift had special need to have livestock moved in that way.

Appellee submits, for the reasons heretofore stated, that this appeal involves no substantial questions. Appellant's argument as revealed by

its Statement as to Jurisdiction is simply reiterations of arguments previously rejected by the Commission and the District Court. The determination of the reasonableness of a rate, or whether it is discriminatory is a question, as previously stated, on which the finding of the Commission is conclusive if supported by substantial evidence unless there was some irregularity in the proceedings or some error in the application of the rules of law. *Western Paper Makers' Chemical Co.* v. *United States,* 271 U. S. 268, 271; *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 665; *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 286; *Board of Trade of Kansas City* v. *United States,* 314 U. S. 534, 546. The issues involved in this appeal are the same as were before the Court in *Atchison, T. & S. F. Ry.* v. *United States,* 295 U. S. 193, in which the Court only reversed the Commission insofar as it failed to make adequate findings in support of its order with respect to the yardage charges assessed by Union. Since the Supreme Court has affirmed the principles involved in this appeal time and again, it is submitted that no substantial question requiring oral argument is raised here.

In respect of the further contention of Swift (Jurisdictional Statement, p. 12) that the Commission's decision is wrong because it excused Junction's discriminatory service on the ground of inadequate motive power (found to be using

only 47 engines at the time of the hearing as against 86 engines in 1925) the fallacy of this contention is readily apparent when consideration is taken of the fact, as revealed by the evidence of record, that Junction is operating in an efficient manner and that any additional side-track delivery is not dependent upon the increase in the number of switching engines but upon the ability of Junction to obtain the maximum use of the 47 it now operates over the congested yards and tracks in the stockyard area. The assumption that the use of any number of engines over 47 would slow down deliveries is much more logical it would seem, than that an additional number would facilitate switching and relieve congestion. This is true because of the scarcity of tracks and yards available for switching.

In connection with the contention of Swift that the Commission erred in failing to find a violation of Section 1 (9) of the Act (Jurisdictional Statement, pp. 12–13), it is submitted that there is no basis for such an allegation. The facts are, as shown by the record, that under the Commission's order Swift can receive its shipments of livestock on its private side track by the payment of the switching charge, which charge has been found to be reasonable and otherwise lawful. Section 1 (9) does not impose any other requirement.

In the light of the facts in the case at bar, the District Court's holding is amply sustained by the authorities cited herein. It is submitted that the findings and conclusions of the District Court are sound and that this appeal presents no substantial question.

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

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